(7)

Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

No. 03-107

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

BILLY JO LARA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF IDAHO, ALABAMA, LOUISIANA, NEBRASKA, SOUTH DAKOTA, AND UTAH SUPPORTING PETITIONER IN PART

LAWRENCE G. WASDEN
Attorney General
State of Idaho
CLAY R. SMITH
Deputy Attorney General
Counsel of Record
700 W. Jefferson
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

(Additional Appearances On Inside Cover)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

36 pp

ADDITIONAL AMICI CURIAE APPEARANCES

WILLIAM H. PRYOR JR.
Attorney General
State of Alabama

RICHARD P. IEYOUB
Attorney General
State of Louisiana

JON BRUNING
Attorney General
State of Nebraska

LARRY LONG
Attorney General
State of South Dakota

MARK L. SHURTLEFF
Attorney General
State of Utah

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE* STATES	1
STATEMENT	4
SUMMARY OF THE ARGUMENT	10
ARGUMENT	12
I. BECAUSE THE ICRA AMENDMENTS DO NOT DELEGATE FEDERAL PROSECUTORIAL AUTHORITY, RESPONDENT'S DOUBLE JEOPARDY CLAIM FAILS. THE QUESTION WHETHER CONGRESS CAN "RESTORE" INHERENT TRIBAL AUTHORITY SHOULD NOT BE ADDRESSED	12
II. CONGRESS LACKED AUTHORITY UNDER THE INDIAN COMMERCE CLAUSE TO CONFER RETAINED INHERENT AUTHORITY ON TRIBES	18
CONCLUSION	29

TABLE OF AUTHORITIES

Page

CASES:

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).....13

Atherton v. FDIC, 519 U.S. 213 (1997).....22

Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989).....15

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).....22

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).....25

Chickasaw Nation v. United States, 534 U.S. 84 (2001).....15

City of Boerne v. Flores, 521 U.S. 507 (1997).....23

City of Milwaukee v. Illinois, 451 U.S. 304 (1981).....21, 22

Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992).....15

Crowell v. Benson, 285 U.S. 22 (1932).....14

Diamond v. Chakrabarty, 447 U.S. 303 (1980).....24

Dickerson v. United States, 530 U.S. 428 (2000).....23

Duro v. Reina, 495 U.S. 676 (1990).....*passim*

Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765 (1984).....20

Ex parte Crow Dog, 109 U.S. 556 (1883).....25

FEC v. Akins, 524 U.S. 11 (1998).....14

Field v. Mans, 516 U.S. 59 (1995).....16

Fletcher v. Peck, 10 U.S. (6 Cranch) 84 (1810).....25

Fox v. Ohio, 46 U.S. (5 How.) 410 (1847).....12

TABLE OF AUTHORITIES – Continued

Page

Heath v. Alabama, 474 U.S. 82 (1985).....12

Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).....25

Kent v. Dulles, 357 U.S. 116 (1958).....14

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).....22

Means v. Northern Cheyenne Tribal Court, 154 F.3d 941 (9th Cir. 1998).....14, 15, 16

Montana v. United States, 450 U.S. 544 (1981).....15

Morisette v. United States, 342 U.S. 246 (1952).....16

Morris v. Tanner, No. CV 99-82-M-DWM, 2003 WL 22439854 (D. Mont. Oct. 28, 2003).....18

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985).....19, 20, 21, 22

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).....*passim*

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).....14, 23

Rice v. Rehner, 463 U.S. 713 (1983).....20

Rivers v. Roadway Exp., Inc., 511 U.S. 298 (1994).....24

Robertson v. Seattle Audubon Soc'y, 503 U.S. 429 (1992).....23

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 1

Seminole Tribe v. Florida, 517 U.S. 44 (1996).....27

Steel Co. v. Citizens for Better Env't, 523 U.S. 83 (1998).....14

Talton v. Mayes, 163 U.S. 376 (1896) 2

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).....22

TABLE OF AUTHORITIES – Continued

Page

United States v. Dixon, 509 U.S. 688 (1993) 12

United States v. Enas, 255 F.3d 662 (9th Cir. 2001) (*en banc*), *cert. denied*, 534 U.S. 1115 (2002)....9, 15, 16, 18, 19

United States v. Kagama, 118 U.S. 375 (1886).....25

United States v. Long, 324 F.3d 475 (7th Cir.), *cert. denied*, 72 U.S.L.W. 3225 (U.S. Oct. 6, 2003) (No. 1801).....26

United States v. Lopez, 514 U.S. 549 (1995).....23

United States v. Rogers, 45 U.S. (4 How.) 567 (1846).....25

United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998).....16, 17

United States v. Weaselhead, 165 F.3d 1209 (8th Cir.), *cert. denied*, 528 U.S. 829 (1999) 7

United States v. Wheeler, 435 U.S. 313 (1978).....13, 15, 21, 26, 28

Williams v. Taylor, 529 U.S. 362 (2000) 23

CONSTITUTION AND STATUTES:

U.S. Constitution
Article I, § 8, cl. 3 2

18 U.S.C. § 111(a)(1) 9

18 U.S.C. § 1153.....13

18 U.S.C. § 1362..... 4

18 U.S.C. § 2032.....13

TABLE OF AUTHORITIES – Continued

Page

Indian Civil Rights Act, 25 U.S.C. §§ 1301-1308 2

25 U.S.C. § 1301(2).....5, 7, 15

25 U.S.C. § 1301(4).....2, 7

25 U.S.C. § 1303.....2, 3

MISCELLANEOUS:

Public Law 280, Act of Aug. 15, 1953, 67 Stat. 588..... 4

Pub. L. No. 101-511, 104 Stat. 1856 (1990).....5, 6

Pub. L. No. 102-137, 105 Stat. 646 (1991)..... 7

H.R. Conf. Rep. No. 938, 101st Cong., 2d Sess. (1990).....5, 6

H.R. Conf. Rep. No. 102-168, 102d Cong., 2d Sess. (1991)..... 8

S. Rep. No. 102-153, 102d Cong., 2d Sess. (1991) 8

137 Cong. Rec. S13,469 (Sept. 23, 1991) 8

Merrill, Thomas W., *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1 (1985).....28

BRIEF AMICUS CURIAE

The States of Idaho *et al.* respectfully submit a brief *amicus curiae* supporting reversal of the judgment below pursuant to S. Ct. R. 37.4.

INTEREST OF *AMICI CURIAE* STATES

Effective law enforcement is a paramount concern of the *amici curiae* States and their political subdivisions. They view law enforcement within Indian country as a multi-sovereign responsibility and recognize that protection of all reservation residents, regardless of Indian or member status, can be achieved only through the comprehensive exercise of federal, state, and tribal authority. The States, therefore, fully share the desire of the United States and tribes to avoid "jurisdictional gap[s]" (Pet. 3) that not only leave criminal behavior unaddressed but also promote such behavior.

The fundamental issue here, however, is not the propriety of adopting laws to address jurisdictional gaps which may have arisen in the wake of this Court's decision in *Duro v. Reina*, 495 U.S. 676 (1990). The issue instead is whether Congress has selected a constitutionally permissible method to achieve that end. Just as the States have a core sovereign interest in effective law enforcement, so too do they have a fundamental interest in ensuring that their citizens are accorded those rights guaranteed under the United States Constitution where criminal sanctions are possible. It is settled, of course, that Indian tribes are extra-constitutional sovereigns not subject to the Bill of Rights and that exercise of their inherent authority accordingly is not limited by those constitutional provisions. *Santa*

Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376, 384 (1896). It is also settled that while the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1303, statutorily confers many of those basic rights, it does not confer all (*Duro*, 495 U.S. at 693). For this and other reasons, the Court recognized in *Duro* that ICRA cannot be viewed as a true substitute for the Bill of Rights. *Id.* at 693. Aside from these purely criminal process-related concerns, the States have an equally fundamental interest in preventing racial criteria from being employed to distinguish among their citizens. The 1990 and 1991 amendments to ICRA "recogniz[ing] and reaffirm[ing]" inherent tribal power over nonmember Indians[1] for criminal jurisdiction purposes raise a significant question as to both of these interests, since Congress has chosen to pursue a path that exposes nonmember Indians, solely on the basis of their ancestry, to deprivation not only of substantive criminal law protections but also of civil remedies normally available against federal officials and employees where governmental overreaching such illegal searches and seizures, false imprisonment or malicious prosecution has occurred. Last, and most important for immediate purposes, Congress has attempted to achieve this otherwise constitutionally problematic result through exercise of authority under the Indian Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, that it does not possess and in derogation of this Court's Article III authority.

[1] The term "nonmember Indian" means, for purposes of this brief, an individual who is an "Indian" under the Major Crimes Act but is not a member of the tribe exercising criminal jurisdiction over him. *See* 25 U.S.C. § 1301(4).

Although the constitutional issue raised here by the United States is thus grave, the *amici* States do not believe that it must be resolved in this case. The dispositive question, in the their view, is whether the ICRA amendments attempted to restore the retained inherent tribal authority found lacking in *Duro* – as their plain text indicates – or whether they effected a delegation of federal authority – as the Eighth Circuit Court of Appeals held. Pet. 10a. If the lower court erred on the threshold statutory construction question, this matter should be at an end because, irrespective of whether the tribal court had criminal jurisdiction over Respondent, no cognizable double jeopardy claim would exist; *i.e.*, even if Congress lacked the power to restore inherent authority to tribes, it did not delegate federal prosecutorial authority to them so as to negate applicability of the dual sovereignty doctrine. Reversal would be required without reference to whether the amendments are valid. Respondent's remedy in that situation would lie in pursuing habeas corpus relief under 25 U.S.C. § 1303 concerning his tribal court conviction, not in attacking the propriety of his federal prosecution.

The *amici* States nevertheless will address the merits of the question presented because of its importance and because they profoundly disagree with the United States' position. The Federal Government asks this Court's sanction of unreviewable congressional power to invest tribes with "retained" and "inherent" authority which the Court has determined previously not to exist in tribes themselves, which Congress itself does possess since it inheres if all only in tribes, and which will operate wholly outside the parameters of the Constitution despite its undeniable congressional genesis. Congress, for example, could "recognize[ ]" the inherent authority of tribes to tax

any person or entity that enters or conducts business on their reservations, could reverse the Court's holding in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), by "reaffirm[ing]" tribal criminal jurisdiction over non-Indians, or could even "recognize[ ]" inherent tribal authority over the States. Such extraordinary, unfettered power will work immediate injury to nonmember Indians like Respondent and lay the doctrinal foundation for incalculable damage in the future to the very fabric of the Constitution.

STATEMENT

A.

In *Duro*, this Court invalidated a conviction by the Pima-Maricopa Indian Community Court of a member of the Torres-Martinez Band of Cahuilla Mission Indians for the offense of firing a weapon on the Salt River Indian Reservation. The Court thereby extended to nonmember Indians the holding in *Oliphant* that tribes lack retained inherent criminal jurisdiction over non-Indians. The final part of the *Duro* opinion addressed concerns over an alleged "jurisdictional void" with respect to "minor offenses committed by nonmember Indians," remarking that "tribes . . . possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands" and that "tribal officers may exercise their power to detain the offender and transport him to the proper authorities." *Duro*, 495 U.S. at 696-97. The Court additionally suggested other mechanisms, such as acquisition of criminal jurisdiction by States under Public Law 280, Act of Aug. 15, 1953, 67 Stat. 588 (codified in relevant part at 18 U.S.C. § 1362), or reciprocal agreements among

tribes. *Duro*, 495 U.S. at 697. It concluded with observation that "[i]f the present jurisdictional scheme proves insufficient to meet the practical needs of reservation law enforcement, then the proper body to address the problem is Congress" but that "[w]e cannot . . . accept these arguments of policy as a basis for finding tribal jurisdiction that is inconsistent with precedent, history, and the equal treatment of Native American citizens." *Id.* at 698.

Congress did respond almost immediately through a rider to the Department of Defense Appropriations Act, 1991. Pub. L. No. 101-511, § 8077(b)-(d), 104 Stat. 1856, 1892-93 (1990); *see* H.R. Conf. Rep. No. 938, 101st Cong., 2d Sess. 133 (1990). The rider effected two substantive changes to ICRA. First, the term "powers of self-government," as defined in 25 U.S.C. § 1301(2), was revised to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." Pub. L. No 101-511 § 8077(b), 104 Stat. at 1892.[2] Second, the rider defined the term "Indian" to mean "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, Title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies." *Id.*, § 8077(c), 104 Stat. at 1892.

[2] As amended, the entire definition read: "'[P]owers of self-government' means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."

These amendments, however, were effective only until September 30, 1992. *Id.*, § 8077(d), 104 Stat. at 1893.

As the accompanying conference report explained, the amendments were deemed necessary by *Duro*'s "reversing two hundred years of the exercise by tribes of criminal misdemeanor jurisdiction over all Indians residing on their reservations" and by the conferees' perception that "[i]n at least twenty states with substantial Indian populations, the Court's decision has created a jurisdictional void in which neither a tribe, a state, or [*sic*] the Federal government is exercising jurisdiction over crimes committed by non-tribal member Indians in Indian country." H.R. Conf. Rep. No. 938 at 133. The report then identified the constitutional power upon which Congress was relying in adopting the amendments and their purpose:

> In an effort to assure that until Congress is able to enact comprehensive legislation addressing the conditions which have arisen in the aftermath of the Court's decision [in *Duro*], law and order can be restored and preserved in Indian country, sections 8077(b) and (c) recognize and affirm the inherent power of tribes to exercise criminal misdemeanor jurisdiction over all Indians on their respective reservations. Such recognition is consistent with the plenary power over Indian affairs that is vested in the Congress under Article I, section 3, clause 8 of the United States Constitution, and with two hundred years of Federal law enacted by the Congress which recognizes the jurisdiction of tribal governments over Indians in Indian country. [¶] This recognition is supported by Federal policy and practice which in many instances, established Indian reservations on which several tribes were to be settled under the governance of a single tribal

> government. Throughout the history of this country, the Congress has never questioned the power of tribal courts to exercise misdemeanor jurisdiction over non-tribal member Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members.

Id. The 1990 amendments were intended, in sum, to undo for approximately one year the holding in *Duro* by "recogniz[ing] and affirm[ing]" inherent tribal authority over all Indians for "misdemeanor" crimes and to afford Congress time to fashion "comprehensive legislation."

Comprehensive legislation was never enacted. Congress simply made the 1990 amendments permanent shortly after their expiration in 1991. Pub. L. No. 102-137, § 1, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301(2) and (4)). In the House conference report, the conferees reiterated the nature and intent of the statute:

> This legislation clarifies and reaffirms the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians on their reservations. The Committee of Conference is clarifying an inherent right which tribal governments have always held and was never questioned until the recent Supreme Court decision in *Duro*. . . . The Congressional power to correct the Court's misinterpretation is manifest as is its plenary power over Indian tribes which derives from the Constitution. [¶] The Committee of the Conference asserts that the Congressional power over Indian tribes allows this recognition of the inherent right of tribal governments to retain this jurisdiction and notes that two fundamental maxims of Indian law come into play in this legislation. First, . . . Congress determines Indian policy. Second, Indian tribes retain all rights and

> powers not expressly divested by Congress. [¶] The Committee of the Conference notes that Congress has the power to acknowledge, recognize and affirm the inherent powers of Indian tribes. The Committee of the Conference notes that Indian tribal governments have retained the criminal jurisdiction over non-member Indians and this legislation is not a delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations. Hence, the constitutional status of Indian tribes as it existed prior to the *Duro* decision remains intact.

H.R. Conf. Rep. No. 102-168, 102d Cong., 2d Sess. 3-4 (1991).[3] The legislative history consequently leaves no doubt about congressional intent: The amendments were not intended to delegate federal power but instead embodied a congressional override of this Court's holding in *Duro* on the basis of perceived power under the Indian Commerce Clause.

B.

Respondent pled guilty in the Spirit Lake Nation tribal court of several offenses related to public intoxication and an assault on Bureau of Indian Affairs police officers, and was sentenced to 155 days' imprisonment. Pet. App. 2a, 36a. He is an Indian but not a member of the

[3] The 1991 amendment reflected the legislation, H.R. 972, as passed by the House of Representatives. The Senate had amended the bill to extend the 1990 amendments only until September 30, 1993, but receded from that amendment during conference committee. 137 Cong. Rec. S13,469 (Sept. 23, 1991); *see also* S. Rep. No. 102-153, 102d Cong., 2d Sess. (1991).

Spirit Lake tribe. *Id.* 2a, 23a; *see* Pet. 4 (identifying respondent as member of Turtle Mountain Band of Chippewa Indians). Over two months after the tribal court conviction, he was indicted under 18 U.S.C. § 111(a)(1) for misdemeanor assault of a federal law enforcement officer. Pet. App. 35a, 37a. Respondent eventually entered a conditional plea of guilty which allowed him to appeal denial of the claim that the federal prosecution was barred, *inter alia*, on double jeopardy grounds by the tribal conviction. Pet. App. 36a. An Eighth Circuit three-judge panel affirmed the conviction, concluding first that *Duro* was predicated on "federal common law, not Constitutional law" (*id.* 26a) and that deferral to Congress was therefore required. The panel turned then to the nature of the action taken by Congress in amending the term "powers of self-government" and held that "[t]he plain language of the amended ICRA together with the amendment's legislative history convinces us that Congress intended to recognize inherent tribal power, not to expressly delegate Congressional authority." *Id.* 27a.

The panel opinion was vacated upon the grant of *en banc* review, and the district court judgment later was reversed. The *en banc* court, like the panel, initially addressed the question whether the holding in *Duro* was "constitutional" in nature but concluded, contrary to the panel and the Ninth Circuit Court of Appeals decision in *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (*en banc*), *cert. denied*, 534 U.S. 1115 (2002), that "the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court." Pet. App. 8a; *accord id.* 10a. Having reached that conclusion, the court briefly addressed the statutory construction issue and

reasoned that since "[i]t is apparent that Congress wished to allow tribes to exercise criminal misdemeanor jurisdiction over nonmember Indians" (*id.*), Respondent "was necessarily prosecuted pursuant to . . . delegated power" (*id.* 11a). Four members of the court dissented as to the determination that "restor[ation]" of inherent tribal authority was beyond congressional power. *Id.* In the dissent's view, the amendments "merely relaxed a common-law restriction on a power previously possessed" (*id.* 12a) – *i.e.*, "the power at hand is a 'retained' one, even if it had been rendered temporarily unavailable by decisions of the United States Supreme Court" (*id.* 13a). Neither the *en banc* opinion nor the dissent discussed whether consideration of Congress' power was essential to resolving the double jeopardy issue.

SUMMARY OF THE ARGUMENT

I. The dispositive issue in this case is whether the ICRA amendments constitute a delegation or a congressional attempt to "restore" retained inherent authority to Indian tribes. The Eighth Circuit erred in construing them as a delegation. The court of appeals effectively applied a variant of the canon of construction that favors reading statutes in a manner that avoids determination of difficult constitutional issues, but reliance on that canon was inappropriate because the amendments unambiguously seek to create inherent tribal authority. They employ a term – "inherent power" – that has specific reference to this Court's Indian law jurisprudence and constitute a direct response to holding in *Duro* that Indian tribes lack such authority over nonmember Indians. The more applicable canon of construction teaches that where Congress

takes terms from the common law, it also presumptively takes their common law meaning, and here the term "inherent authority" refers to the retained inherent tribal authority, not delegated authority. Even were the amendments unambiguous, their legislative history leaves no doubt that Congress consciously attempted to confer inherent authority, and not to delegate federal power. Regardless of whether Congress' attempt was successful, Respondent's tribal court conviction was the act of a separate sovereign and did not bar his subsequent federal court prosecution. The amendments' constitutionality thus presents a nonjusticiable, hypothetical controversy.

II. If this Court reaches the question whether Congress has power under the Indian Commerce Clause to "restore" retained inherent authority to tribes, it should answer that question negatively. The Court has articulated clearly the roles of Judicial and Legislative Branches in the present context, finding the judiciary constitutionally assigned the power to determine whether tribes retain inherent authority over the activities of nonmembers and Congress constitutionally assigned the power to eliminate or restrict such authority. The decision in *Duro* embodies the Court's exercise of its constitutional prerogative "to say what the law is." The "law" was the determination that tribes had been divested of retained inherent authority to subject nonmember Indians to criminal sanction as a "necessary incident" of their dependent status. That divestiture occurred without congressional action and involved authority that Congress never possessed in the first instance to confer. Reliance on the principle that Congress may prospectively undo nonconstitutionally-based federal common law determinations by this Court thus is misplaced, since an implicit assumption of such

principle is that congressional power to act exists. Misplaced for similar reasons is reliance on Congress' "plenary" power under the Indian Commerce Clause. Congress undoubtedly may repeal a statute that limits a tribe's inherent authority, since the repeal merely removes an obstacle that Congress itself created. Conversely, Congress cannot create the authority itself – the result that the ICRA amendments purported to accomplish.

ARGUMENT

I. BECAUSE THE ICRA AMENDMENTS DO NOT DELEGATE FEDERAL PROSECUTORIAL AUTHORITY, RESPONDENT'S DOUBLE JEOPARDY CLAIM FAILS. THE QUESTION WHETHER CONGRESS CAN "RESTORE" INHERENT TRIBAL AUTHORITY SHOULD NOT BE ADDRESSED.

A.

Deeply rooted in this Court's double jeopardy jurisprudence is the dual sovereignty doctrine "founded on the common-law conception of crime as an offense against the sovereignty of the government." *Heath v. Alabama*, 474 U.S. 82, 88 (1985). Thus, "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" *Id.*; *see, e.g.*, *Fox v. Ohio*, 46 U.S. (5 How.) 410, 435 (1847). The controlling consideration under the doctrine is whether "the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns." 474 U.S. at 88; *accord United States v. Dixon*, 509 U.S. 688, 725 (1993).

This Court recognized the doctrine's applicability with respect to successive tribal and federal prosecutions in *United States v. Wheeler*, 435 U.S. 313 (1978). There, it rejected a double jeopardy defense raised by a Navajo Nation member to a federal prosecution for statutory rape under 18 U.S.C. §§ 1153 and 2032 after he had been convicted in tribal court under Navajo law for disorderly conduct and contributing to the delinquency of a minor. The Court's determination was premised on the conclusion that "the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians implicitly lost by virtue of their dependent status" (435 U.S. at 326) and that Congress had not elected to remove such power (*id.* at 328). Under those circumstances, the tribe in prosecuting its member "d[id] so as part of its retained sovereignty and not as an arm of the Federal Government." *Id.*

In light of *Wheeler* and other dual sovereignty decisions, the double jeopardy inquiry must focus whether the ICRA amendments delegated federal power in the form of criminal jurisdiction to tribes over Indians who are not their members, as the Eighth Circuit held, or whether those amendments were directed at "restor[ing]" (Pet. (I)) the retained inherent authority found absent in *Duro*. If no delegation is found, then the double jeopardy claim fails regardless of whether the amendments were successful in achieving their object of filling the "jurisdictional gap" purportedly left by *Duro*. This fact would render further litigation over the amendments' constitutionality nonjusticiable, since the court of appeals' judgment must be reversed once the amendments are construed not to have effected a delegation of federal prosecutorial power. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)

("[a] justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot"); *cf. Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 93 (1998) (rejecting use of "hypothetical jurisdiction" to resolve merits of claim in lieu of determining subject matter jurisdiction issue). Relief in the effective form of an advisory opinion, needless to say, is inappropriate. *FEC v. Akins*, 524 U.S. 11, 24 (1998).

B.

This Court has recognized a canon of construction that favors one construction of a statute over another to avoid resolving difficult constitutional issues. *E.g.*, *Kent v. Dulles*, 357 U.S. 116, 130 (1958); *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 n.2 (1995) (entertaining construction not offered by party before lower courts where the proposed "reading of the statute would avoid a constitutional question of undoubted gravity"). The court of appeals applied a variant of this canon in deeming the amendments to be a delegation of federal authority, reasoning that they would be invalid if construed to "have the effect that they plainly sought to achieve." Pet. App. 10a.[4] Canons

[4] The Eighth Circuit was not the first court to follow that analytical path. In *Means v. Northern Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998), a majority of a Ninth Circuit panel also found delegation on the ground that "[w]hile the legislative history of this section suggests that Congress did not intend to delegate such authority to the tribes, that is essentially the amendments' effect." *Id.* at 946. One panel member concurred in the judgment but disagreed with this aspect of the opinion. *Id.* at 950 (Reinhardt, J., concurring). The construction of

(Continued on following page)

of construction nevertheless may not be employed as an end-run around otherwise unambiguous text. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). They are, as the Court has stressed quite recently, merely "designed to help judges determine the Legislature's intent as embodied in particular statutory language." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). The Eighth Circuit's implicit application of the canon in favor of construing statutes to reach a constitutional result breached this fundamental limitation.

This Court also reiterated in *Chickasaw Nation* that "[s]pecific canons 'are often countered . . . by some maxim pointing in a different direction.'" 534 U.S. at 94. That admonition has special force here. The court of appeals acknowledged that Congress "plainly sought" to invest tribes with inherent authority that this Court found absent in *Duro*. Pet. App. 10a. Its acknowledgment was unsurprising, since the amendments expressly stated so by their recognition and affirmance of the "inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2). The term "inherent power" was not used casually and had unmistakable reference to a settled body of decisional law developed during the preceding dozen years that explored the scope of inherent tribal authority over members and nonmembers, including most prominently *Oliphant*, *Wheeler*, and *Duro*. *See also Montana v. United States*, 450 U.S. 544, 564 (1981); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 425-26 (1989) (plurality op.).

the amendments adopted in *Means* was overruled subsequently by the *en banc Enas* court. 255 F.3d at 675 n.8.

The explicit use of "inherent power," together with incongruence of "recogniz[ing] and affirm[ing]" *delegated* power, leaves no reasonable doubt in this respect. *Means*, 154 F.3d at 950 (Reinhardt, J., concurring). The Eighth Circuit thus ignored a canon of construction that had direct relevance, namely, "'that [w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Field v. Mans*, 516 U.S. 59, 69 (1995) (some internal quotation marks omitted); *see also Morisette v. United States*, 342 U.S. 246, 250 (1952).

Even were there ambiguity in the text of the amendments, crystal clear legislative history eliminates any question over their proper interpretation. The review of such history above leaves no doubt concerning congressional awareness of the difference between inherent tribal and delegated federal power, particularly in the context of criminal jurisdiction, and it carefully chose a path that, if controversial as a constitutional matter, was preferred from a policy perspective. *See also Enas*, 255 F.3d 669-70 (summarizing legislative history); *Means*, 154 F.3d at 950-51 (Reinhardt, J., concurring) (same). Indeed, the *en banc* majority below knew full well the import of the amendments given their text and the unequivocal legislative history, quoting as it did from *United States v. Weaselhead*, 156 F.3d 818, 823 (8th Cir. 1998), for the proposition that "[t]he ICRA amendments are 'a legislative enactment purporting to recast history in a manner that that alters the Supreme Court's stated understanding of the organizing principles by which the Indian tribes were incorporated into our constitutional system of government.'" *Weaselhead*, in turn, had remarked that "Congress's intent

to do so is plain from the legislative history." *Id.* at 823 n.4.[5]

The court of appeals consequently realized that the ICRA amendments embodied a direct and unqualified reversal of *Duro* but elected to construe around what it viewed as the unconstitutionality of the actual method used to effect the reversal; *i.e.*, it understood that Congress sought to fill the perceived *Duro*-induced "jurisdictional gap" by overruling the very rationale of this Court's decision and thereby restoring the *status quo ante*. This attempt to circumvent a deliberate congressional choice is unfaithful to amendments' text and cannot stand. It is instead plain that no transfer of federal authority was made under the amendments and that jeopardy did not attach by virtue of Respondent's tribal court conviction. The court of appeals' judgment therefore must be reversed, and analysis of the amendments' constitutionality should await an appropriate challenge by a nonmember Indian to a tribal court criminal judgment.

---

[5] The three-judge panel opinion in *Weaselhead* was vacated, and on *en banc* rehearing the district court judgment, which the panel had reversed, was affirmed by an equally divided vote. *United States v. Weaselhead*, 165 F.3d 1209 (8th Cir.), *cert. denied*, 528 U.S. 829 (1999).

II. CONGRESS LACKED AUTHORITY UNDER THE INDIAN COMMERCE CLAUSE TO CONFER RETAINED INHERENT AUTHORITY ON TRIBES.

The United States' arguments concerning the scope of Congress' power, if considered,[6] parallel the reasoning in the Ninth Circuit's *Enas* decision. It contends like the *Enas* principal opinion (255 F.3d at 670) that *Duro* embodies nothing more than nonconstitutionally-based federal common law subject to modification by Congress pursuant to its "plenary" Indian Commerce Clause power. The United States thus argues that (1) "to the extent that Congress has not spoken directly to the issue, tribal sovereignty has been treated as a matter of federal common law" (Pet. 13); (2) "[i]n *Duro*, this Court assessed the extent of tribal criminal jurisdiction by reference to non-constitutional sources, including statutes, treaties, and federal court practice" (*id.* 14); and (3) "[t]he Court has recognized that Congress may, in the exercise of its 'plenary'

[6] Notwithstanding their position that Congress' power to confer retained inherent authority should not be addressed, the *amici* States discuss the amendments' validity because it is placed specifically at issue in the question presented as to which *certiorari* has been granted and because of its importance. The States' analysis does not consider the two other constitutional issues identified above: Whether Congress may subject citizens to the criminal jurisdiction of extraconstitutional entity not bound by the Constitution, and whether the ICRA amendments discriminate on the basis of ancestry, or race. *See Morris v. Tanner*, No. CV 99-82-M-DWM, 2003 WL 22439854 (D. Mont. Oct. 28, 2003) (ICRA habeas corpus proceeding challenging tribal court conviction on racial discrimination, due process, and separation of power grounds). These issues were not raised below by Respondent, presumably because his double jeopardy claim could succeed only if the amendments were deemed a valid delegation of federal authority.

authority over Indian affairs, . . . remove constraints that federal common law would otherwise impose on Tribes' exercise of their sovereign powers" (*id.*). Like the *Enas* concurring opinion (255 F.3d at 679-80, 682 n.8), it goes one step further, contending that "[e]ven if the constraints on the Tribes' exercise of sovereign powers were viewed a deriving from understandings or default rules reflected in the Constitution, it would not necessarily follow . . . that Congress could not authorize an exercise of power that the Tribes would otherwise lack." *Id.* 16. As support for the last proposition, the United States analogizes congressional power to negate the preemptive impact of the dormant Interstate Commerce Clause on state authority through affirmative legislation. *Id.*

Although the analytical predicates for the federal position are unsound, perhaps its most striking feature is the ultimate result: Not only does Congress have the power to nullify this Court's determinations as to whether certain actions fall within a tribe's retained inherent authority, but it also has the *final* say, so that the congressional assessment of "non-constitutional sources" or "understandings or default rules reflected in the Constitution" is not subject to substantive judicial review. The Indian Commerce Clause does not sanction this extravagant view of congressional power.

A.

This Court held in *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985), that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by

reference to federal law and is thus a 'federal question' under [28 U.S.C.] § 1331." 471 U.S. at 852. While the Court's framing of the question was specific to the controversy before it – whether a tribal court possessed jurisdiction over a personal injury claim arising on a state school district's land – it cited *Oliphant* in support of the general statement that the tribal authority issue must be decided with reference to federal law. *Id.* at 852 n.14. The Court continued on to distinguish the categorical rule where criminal jurisdiction over non-Indians is at stake with the more flexible analysis required where civil authority is contested. *Id.* at 855-56 ("the existence and extent of a tribal court's [civil] jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions"). Notwithstanding this critical difference, *National Farmers* removed any doubt that the decisional calculus as to the existence of retained inherent tribal authority as to either civil or criminal jurisdiction is judge-made and federal law-based.

National Farmers additionally repeated the settled precept that "the power of the Federal Government over the Indian tribes is plenary" (471 U.S. at 851) and cited several decisions for that rule (*id.* at 851 n.10). None of those cases stood for the notion that Congress may "restore" retained inherent authority but rather, to the extent they were concerned with tribal power, reflected instances of actual or alleged "'defeasance by Congress'" of such power. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 788 n.30 (1984) (licensing of hydropower facilities on Indian lands); *Rice v. Rehner*,

463 U.S. 713, 719 (1983) (control of reservation liquor transactions); *Wheeler*, 435 U.S. at 323 (criminal jurisdiction over member Indians). The lack of citation to cases finding congressional ability to confer inherent authority comes as no surprise, since the ICRA amendments appear to be the first instance where Congress has attempted to do so.

This Court's analysis in *National Farmers* provides the framework against which the validity of the revised "powers of self-government" definition must be measured. It succinctly identified the separate functions that the Judicial and Legislative Branches heretofore have played where inherent tribal authority is at stake. Committed to the judiciary is the question whether inherent authority is "retained" by tribes; committed to Congress is the question whether that authority, if otherwise extant, should remain "retained." The United States, however, essentially contends that Congress can assume pursuant to its Indian Commerce Clause power the duties traditionally discharged by the courts and thus discharge *both* roles even to the point of legislatively vetoing a decision by this Court. That contention is incorrect.

B.

1. The United States' reliance on the principle that Congress may displace federal common law rules not constitutionally based is misplaced. This principle derives from the recognition that "[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981). Federal common law typically is created

to fill a vacuum that could be, but has not been, occupied congressionally. *Id.* at 313. As a consequence, that judge-made law "is 'subject to the paramount authority of Congress'" to modify or eliminate. *Id.* at 313; *see also id.* at 314 ("when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears"). Particularly noteworthy is the fact that these standards have been developed primarily in a preemption context – *i.e.*, the creation of judge-made law to override application of state law as the rule of decision – where congressional power to act was uncontested. *Id.* at 313; *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-55 (1998); *Atherton v. FDIC*, 519 U.S. 213, 218-19 (1997); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981).

The situation here differs markedly. First, no concern exists over whether a state rule of decision is appropriate. The determination in *National Farmers*, as it had been earlier in *Oliphant* and would be later in *Duro*, resulted from an *interpretative* exploration of federal law-based factors, including constitutional requirements, statutory provisions, common law principles and Executive Branch practice, to determine whether tribal power to hold persons other than their own members criminally liable had been implicitly divested by virtue of their status as domestic dependent nations. The *Duro* Court thus was not attempting to fill in a remedial void left by Congress and susceptible to a state-law rule of decision. The Court instead was carrying out the exclusive function of "the judicial department to say what the law is" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The constitutionally preeminent role of the judiciary in this regard was

unaffected by whether the "law" at issue derived from application of the Constitution, a federal statute, common law, executive policy, or a combination of the four. *Williams v. Taylor*, 529 U.S. 362, 378-79 (2000); *see also Plaut*, 514 U.S. at 222 ("The essential balance created by this allocation of authority was a simple one. The Legislature would be possessed of power to 'prescrib[e] the rules by which the duties and rights of every citizen are to be regulated,' but the power of '[t]he interpretation of the laws' would be 'the proper and peculiar province of the courts'") (quoting *The Federalist* No. 78, at 523, 525 (J. Cooke ed. 1961)).

Second, implicit in the "paramount authority" of Congress is presence of the claimed authority itself. No one disputes that Congress lacks power to overrule this Court's constitutional interpretations. *E.g.*, *Dickerson v. United States*, 530 U.S. 428, 437 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 518-19 (1997). Plainly enough, the reason is that congressional power must be exercised consistently with constitutional constraints and that Congress is bound by the Judicial Branch's construction of the Constitution. *See United States v. Lopez*, 514 U.S. 549, 566 (1995) ("The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. . . . Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the Judiciary's duty 'to say what the law is'") (citation omitted). Congress similarly may not overrule a judicial construction of a statute, although it may revise the statute itself in response to the construction in anticipation that it will be interpreted differently than the original law. *E.g.*, *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992) (no separation of powers violation where

statute "compelled changes in law, not findings or results under old law"); *cf. Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-33 (1994) ("[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction"); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) ("[i]t is . . . correct that Congress, not the courts, must define the limits of patentability; but it is equally true that once Congress has spoken it is 'the province and duty of the judicial department to say what the law is'"). Consequently, reliance here on the notion that Congress may overrule "federal common law" rules is misplaced where Congress has attempted to reverse this Court's *interpretation* of the complex interaction of the Constitution, statutes, Executive Branch practice, and the unique relationship of Indian tribes with the Federal Government and the States, and not to modify the positive law to which the interpretation was directed.

2. Once Congress' power to set aside prospectively certain forms of federal common law is dismissed as a basis to sustain the ICRA amendments, the real issue presented by the United States' position becomes clear: Whether the Indian Commerce Clause embodies a grant of congressional power sufficient to allow Congress to "restore" retained inherent authority either generally or in the face of a contrary decision by this Court. The Court's reasoning in *Oliphant* and *Duro* establishes that the very nature of such authority is incompatible with the claimed congressional restoration.

In concluding that tribes lack criminal jurisdiction over non-Indians, the *Oliphant* Court engaged in a two-part analysis. The first part examined various treaties, statutes, federal court decisions, and Executive Branch

and congressional documents found relevant to the issue. 435 U.S. at 198-205. The second part is more crucial here because, although "the shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carrie[d] considerable weight" (*id.* at 206), this Court ultimately relied on "our earlier precedents"[7] for the black-letter holding that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." 435 U.S. at 208. Those precedents established that "[u]pon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Id.* at 209. This divestiture of retained authority was not "limited only by specific restrictions in treaties or congressional enactments" (*id.* at 208); rather, "[b]y submitting to the overriding sovereignty of the United States, Indian tribes . . . *necessarily* gave up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress" (*id.* at 210) (emphasis supplied). That conclusion was premised on the Bill of Rights and the accompanying "great solicitude [of the United States] that its citizens be protected by the United States from unwarranted intrusions on their personal liberty." *Id.* Any other result, this Court reasoned, "would belie the tribes' forfeiture of full

---

[7] *United States v. Kagama*, 118 U.S. 375 (1886); *Ex parte Crow Dog*, 109 U.S. 556 (1883); *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 84 (1810).

sovereignty in return for the protection of the United States." *Id.* at 211. Tribes lack retained inherent criminal jurisdiction over non-Indians, in sum, as an essential incident of their dependent status, and not because of any particular congressional action or set of actions. Simple logic dictates that Congress can take no action to "restore" inherent authority that it has never possessed or divested through specific legislation capable of repeal.[8]

The holding in *Duro* was "compelled" by the "rationale" of *Oliphant* and *Wheeler*. *Duro*, 495 U.S. at 685. The aspect of the latter cases that this Court found controlling was the principle "the retained sovereignty of the tribes is that needed to control their own internal relations[ ] and to preserve their own unique customs and social order." *Id.* The Court deemed *Wheeler* singularly germane because it "rested on the premise that the prosecution was part of the tribe's *internal* self-governance" – a premise which led to the conclusion that "[h]ad the prosecution been a manifestation of external relations between the Tribe and outsiders, such power would have been inconsistent with the

[8] This case does not present an instance where otherwise existing inherent tribal authority has been divested through an act of Congress. *See United States v. Long*, 324 F.3d 475, 483 (7th Cir.) (tribal court of terminated but later restored tribe possessed inherent criminal jurisdiction over member; distinguishing the ICRA amendments as presenting the question "whether Congress could *create* inherent sovereign powers that the Supreme Court had earlier concluded Indian tribes did not possess[,]" while in the case at hand "Congress merely sought to restore to the Menominee that which it had taken from the Tribe earlier"), *cert. denied*, 72 U.S.L.W. 3225 (U.S. Oct. 6, 2003) (No. 1801). ICRA itself is a specific limitation on inherent tribal authority, whose repeal would "restore" such authority to the scope existing as of the law's enactment in 1968.

Tribe's dependent status, and could only have come to the Tribe by delegation from Congress, subject to the constraints of the Constitution." *Id.* at 686. It added later in the opinion that "[t]he retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members." *Id.* at 693. Although the Court did address the respondents and *amicus curiae* United States' reliance on "history" for a contrary holding in the third part of the opinion (*id.* at 688-92), the basis for the decision derived not from that analysis, which was made *after* the case effectively had been decided, but from the *Oliphant* determination that tribes had been divested of criminal jurisdiction as a necessary incident of their dependent status. Congress accordingly has no more power to "restore" retained inherent authority for criminal prosecution purposes where nonmember Indians are the subject population than it does where non-Indians are.

Congress' plenary authority under the Indian Commerce Clause does not change this result. Congressional power over Indian affairs is unquestionably broad (*e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996)), yet it does not encompass the right to "restore" authority that, by its very nature, existed long before Congress came into being and whose only source is the entity to which it is allegedly "restored." Once again, Congress can repeal a statute that divested or limited some form of retained authority, but in that instance it merely removes a statutory obstacle to the exercise of a power that it neither did nor could confer. It is for this reason that the United States' analogy to Congress' ability to remove the preemptive impact of the dormant Interstate Commerce Clause fails. While Congress can authorize the States to exercise their inherent police powers notwithstanding the impact

on commerce, it cannot *create* the underlying police power.[9] Such authorization, moreover, is fully consistent with the discrete roles played by the Judicial and Legislative Branches, since the congressional action does not "call into question the Court's interpretation of the Constitution" or "challenge the constitutional rule." Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 56 n.239 (1985). The ICRA amendments stand in studied contrast given their explicit purpose of overturning this Court's understanding concerning the scope of the inherent authority retained by tribes as of the Constitution's adoption and ratification.

[9] The United States' suggestion that the reference to "delegation" in *Duro* or elsewhere includes "delegating" retained inherent authority suffers from the same flaw. Pet. 15 n.2. Congress cannot "delegate" what it does not have in the first place. It is thus plain that *Duro*'s references to congressional "delegation" (*Duro*, 495 U.S. at 686, 694) related specifically back to *Wheeler* and the question decided there: "Is [the power to punish tribal offenders] a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?" *Wheeler*, 435 U.S. at 322. This conclusion also is compelled by the Court's requiring any delegation of criminal jurisdiction to be "subject to the constraints of the Constitution" (*Duro*, 495 U.S. at 686) – a requirement that cannot be satisfied through "delegation" of inherent authority given the tribes' extra-constitutional status. *See id.* at 693 (discussing the unique nature of tribal prosecutions and the fact that ICRA "provides some statutory guarantees of fair procedure . . . [which] are not equivalent to their constitutional counterparts").

CONCLUSION

The judgment of the Court of Appeals should be reversed without reaching the constitutionality of the ICRA amendments.

Respectfully submitted,

LAWRENCE G. WASDEN
Attorney General
State of Idaho
CLAY R. SMITH
Deputy Attorney General
Counsel of Record
700 W. Jefferson
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

November 2003